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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1948.

**STATE OF INDIANA, GROSS INCOME
TAX DIVISION,**

Petitioner,

vs.

EILEEN ELIZABETH STRAUSS,

Respondent.

No. 338.

**ANSWER AND BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

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**ANSWER TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA.**

Respondent says there is no substantial reason for granting the petition.

JURISDICTION.

The jurisdiction of this Court properly is invoked under Section 237 (b) of the Judicial Code as amended, Title 28, U. S. C. A., 344 (b), because of the immunity claimed by Respondent under the commerce clause of the Constitution of the United States and because of the right asserted by Petitioner to apply the Indiana Gross Income Tax Act in levying a tax. Respondent wishes to emphasize, however, that the validity of the Gross Income Tax Act is not involved; only the validity of the tax is questioned.

REASONS FOR REQUESTING WRIT.

The reasons stated by Petitioner why the writ should be granted by this Court appear to be without merit in view of the decisions already rendered by this Court. The decision of the trial court and the opinion of the Supreme Court of Indiana are in full consonance with the stream of decisions as well as specific decisions of this Court.

QUESTIONS PRESENTED.

Respondent suggests that Petitioner properly has not set forth in its petition the questions presented. Simply stated—the only question presented is: Was the Respondent engaged in interstate commerce?

This Court heretofore has decided that the Gross Income Tax Act of Indiana is of such character that its application to interstate commerce violates Article I, Section 8, of the Constitution of the United States.

SUMMARY STATEMENT.

Petitioner has not accurately presented a summary statement of the case. As Respondent will point out in her brief, Petitioner again is attempting to present to the Court a question already determined adversely to petitioner by this Court. The same Gross Income Tax Act has been before the Court in previous cases and it was decided by this Court that the Act could not be applied to tax interstate commerce. The validity of the Act is not here involved—only the validity of the tax.

Petitioner continues to insist that Respondent was not engaged in interstate commerce. Consequently, petitioner claims the right to levy a tax in pursuance of the Act.

Since this Court has decided that the Act cannot be employed as authority to levy a tax on interstate commerce,

it follows that the only question remaining is: Was Respondent engaged in interstate commerce?

The facts before the Court show the following: That Respondent, a resident and citizen of Wabash County, Indiana, was engaged in the business of farming, breeding, raising, feeding and selling livestock and other commodities (R. p. 13). That Farmers Shipping Association of North Manchester, Indiana, is an Indiana corporation organized and existing under an act known as the "Non-Profit Cooperative Association Act" (Chapter 20, Acts of 1925 and amendments thereto, Burns' Annotated Indiana Statutes, Section 15-1601), the purpose of which is: "to promote, foster and encourage an orderly and intelligent marketing of agricultural products, particularly livestock, through cooperation; and to limit speculation in weights, and to make the distribution of agricultural products between producer and consumer as direct as efficiently can be done; and to stabilize the marketing of agricultural products" (R. p. 15).

That Respondent with several hundred neighbors engaged in like business were members of said Farmers Shipping Association, who delivered their livestock to the stockyards in North Manchester, Indiana, operated by said Association which was in charge of a manager who marked the livestock, loaded the same in railroad cars or trucks and shipped the same to markets outside the State of Indiana, usually in Buffalo, New York, but sometimes to Chicago, Illinois, and other times to New York, New York (R. p. 15). In cases of livestock, the same was received on consignment by commission merchants, who cared for, graded and sold the same in open, public livestock markets operated under authority of law, licensed by the United States Department of Agriculture and operating under the Packers and Stockyards Act of 1921. That when said livestock was consigned to the said commission merchants

upon the arrival of the same at such points, said commission merchants actually received, cared for, transferred and sold said livestock for the account of the respondent and other members of the Association to various purchasers, which transactions, sales, transfers and deliveries all were begun, effected and ended in said stockyards. That livestock was received in said stockyards daily and sold by commission merchants. That when said merchants sold the same, they received as compensation for their services in receiving, caring for and selling the same a fixed commission, together with any expense made necessary. That the said commission merchants collected the money due from the sale thereof and after deducting commissions and expenses due them, they remitted the net proceeds of the sale to Farmers Shipping Association of North Manchester through United States mails, and perhaps in some instances otherwise (R. p. 15). That the sales were made in Chicago and Buffalo markets at the highest and best bids obtainable and title was transferred upon consummation of the sale in said stockyards. There was no prior order; however, the operations were part of a continuous stream and current of commerce carried on by Respondent and other members of said Farmers Shipping Association as well as thousands of other shippers in various localities and various parts of the United States.

Petitioner demanded that Respondent pay taxes on the receipts from these sales and in pursuance of the Indiana statute Respondent paid said taxes, filed a claim for refund (R. p. 17), which was denied, and entered suit, upon which judgment was rendered in favor of Respondent. On appeal, the judgment of the lower court was affirmed. We believe this succinctly sets forth the pattern of operations, omitting many of the details.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

I.

**No Federal Question of Substance Is Presented Here
Which Has Not Already Been Determined
by This Court.**

Article I, Section 8, of the United States Constitution needs no implementation by legislative enactment.

Freeman v. Hewitt (1946), 329 U. S. 249, 91 L. ed. 265, at page 271;

Morgan v. Virginia (1945), 328 U. S. 373, 90 L. ed. 1317, at page 1323;

Southern P. Co. v. Arizona, 325 U. S. 761, 89 L. ed. 1915.

Respondent was engaged in commerce between the States and to deny that such commerce was interstate within the meaning of the Federal Constitution is to cast aside controlling decisions of this Court. And the question does not hinge on whether Respondent had a prior order.

Dahnke-Walker Milling Co. v. Bondurant (1921), 257 U. S. 282, 66 L. ed. 239, 244;

Swift & Co. v. U. S. (1905), 196 U. S. 375, 49 L. ed. 518, page 525;

McGoldrick v. Berwind-White Coal Mining Co. (1940), 309 U. S. 33, 84 L. ed. 565, 575.

The pattern of facts in the case at bar is not unlike the pattern of facts in cases already decided by this Court involving the same Taxing Authority.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, 82 L. ed. 1365;

Freeman v. Hewitt (1946), 329 U. S. 249, 91 L. ed. 265.

Certainly, in the first above cited authority manufactured articles were involved. In the second, intangibles were sold and this Court decided that the gross receipts from the sales thereof could not be taxed. Here we have livestock shipped to out of state markets licensed by the U. S. Department of Agriculture where the same were sold in an open public market under Federal regulations, the operations, as decided by this Court, being "typical, constantly recurring course of business . . . and the current thus existing is a current of commerce among the states." Other farm commodities such as eggs and poultry were shipped to and sold in extra-state markets to supply the consuming public.

Swift & Co. et al. v. U. S. (1894), 196 U. S. 375, 398, 49 L. ed. 518, 525;

Stafford v. Wallace (1921), 258 U. S. 495, 522, 66 L. ed. 735, 744.

Interstate commerce is a term of very large significance and it "comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted."

Hopkins v. U. S. (1898), 171 U. S. 578, 597, 43 L. ed. 290, 298;

Welton v. Missouri (1876), 91 U. S. 275, 23 L. ed. 347;

Dahnke-Walker Milling Co. v. Bondurant (1921), 257 U. S. 282, 291, 66 L. ed. 239, 244.

The farm commodities were shipped for the purpose of sale or disposition in the out of state markets. To argue that Respondent's gross receipts from commerce are taxable merely because she might have elected not to sell the

same upon arrival at the market is not enlightening since the commodities in fact were sold.

Petitioner has presented no convincing authority under its Proposal I; indeed, the authorities by it cited wholly show the fallacy of its contentions.

II.

The Opinion of the Supreme Court of Indiana Follows the Ruling Precedents of This Court in Upholding the Court of First Instance. The Federal Question Decided Is in Full Consonance With the Applicable Decisions of This Court.

Petitioner has cited numerous authorities which approve ad valorem taxes by local government on property which has come to rest either after or before the incidence of interstate commerce—when such property has become a part of the general mass within the taxing district, and under the control of its owner therein who may or may not decide at some future date again to subject it to the flow of commerce between the states. Of such purport are **Bacon v. Illinois** (1913), 227 U. S. 504, 57 L. ed. 615; also, **Minnesota v. Blazius** (1933), 290 U. S. 1, 78 L. ed. 131, cited by Petitioner.

Wiloil Corp. v. Pennsylvania (1933), 294 U. S. 169, 79 L. ed. 838, is not analogous to the case at bar; neither is **Caskey Baking Co. v. Virginia** (1941), 313 U. S. 117, 85 L. ed. 1229, which involved a license tax for peddling; nor is the store license case of **Liggett v. Lee** (1933), 288 U. S. 517, 77 L. ed. 929.

In **Swift & Co. v. U. S.** (1905), 196 U. S. 375, 49 L. ed. 518, at page 525, we find a pattern to guide us in our consideration as follows:

“ . . . commerce between the states is not a technical legal conception, but a practical one, drawn from

the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

Stafford v. Wallace (1922), 258 U. S. 495, 66 L. ed. 735, at page 742.

In **Stafford v. Wallace** (1922), 258 U. S. 495, 66 L. ed. 735, the constitutionality of the "Packers and Stockyards Act" of 1921 was upheld. In approving the Act and the regulation of stockyards by the Secretary of Agriculture, this Court said:

"The stockyards are not a place of rest or final destination. Thousands of head of livestock arrive daily by carloads and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. . . . The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. The origin of the livestock is in the West; its ultimate destination known to, and intended by, all engaged

in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce."

No theory of Petition that Respondent was not engaged in interstate commerce can upset the powerful and overwhelming language of this Court in the last two quoted cases. The inescapable conclusion must be that Respondent was engaged in interstate commerce, not merely in "events and transactions found in the areas 'affecting commerce.' "

The Supreme Court of Indiana, by its decision and opinion, does not appear to have extended the constitutional prohibition of the State of Indiana to tax interstate commerce. On the other hand, the State Supreme Court has followed the ruling precedents of this Court by holding that the barrier continues to exist.

III.

The Decision of the Supreme Court of Indiana Is Not Untenable.

Petitioner has not attempted to show how or in what respect the decision of the Supreme Court of Indiana is untenable except to claim that the prohibition of the tax would strike a most serious blow to the financial competence of the states. Petitioner would seem to contend that because it needs the money the tax ought to be upheld regardless of the unconstitutional application of the Act.

The Indiana Supreme Court's interpretation of the previous decisions of this Court is not shown to be erroneous in its import and neither is a review of the decision most

vital for such or any other reason. For more than a decade the Gross Income Tax Division taxing authority provided by the Act has been informed by the **Adams** case that the provisions of said Act may not, indeed, cannot, be applied to interstate commerce. Later, in the **Hewitt v. Freeman** case, Petitioner again was informed quite directly that Indiana could not employ the provisions of the Gross Income Tax Act to tax receipts in interstate commerce.

The financial competence of the State of Indiana is not at stake in this litigation. The stake is the commerce clause of our Federal Constitution and the decisions of this Court that the states, including Indiana, cannot tax interstate commerce.

There are many permissible forms of taxation upon intrastate transactions left to Indiana. But a state taxing statute, and specifically the Indiana Gross Income Tax Act, as amended, cannot be constitutionally used as authority to levy a tax on transactions, partly intrastate and partly interstate, without apportionment of the tax to that part of the transactions which are local. The failure of apportionment creates the vice of the Indiana Gross Income Tax Act.

J. D. Adams Mfg. Co. v. Storen (1898), 304 U. S. 307, 82 L. ed. 1365, at pages 1369, 1371;

Freeman v. Hewitt (1946), 329 U. S. 249, 91 L. ed. 265.

IV.

**The Question Already Has Been Decided by
the Court.**

A.

**The tax is on interstate commerce; it does not
merely touch interstate commerce.**

A state income tax on salaries received from Federal agencies was involved in **Graves v. New York** (1939), 306 U. S. 466, 83 L. ed. 927; and in **Helvering v. Gerhardt** (1938), 304 U. S. 405, 82 L. ed. 1427, a federal income tax on salaries paid by an agency of a state was before this Court. It was held that the implication of immunity could not be indulged.

And in **Panhandle Oil Co. v. Mississippi, etc.** (1928), 277 U. S. 218, 224, 72 L. ed. 857, 859, the dissenting opinion does contain the statement that the power to tax is no longer the power to destroy—so long as the Supreme Court of the United States sits. But of what avail is this decision to Petitioner, particularly since this Court still sits?

Having been decided often that the states may not tax interstate commerce—that power being left to the Congress of the United States—there is no reason for further judicial delineation. It may be admitted, however, that frequent questions properly may be raised concerning whether a litigant is or is not engaged in interstate commerce. We submit that the particular facts in the case at bar so conclusively show the Respondent to have been engaged in interstate commerce that no good reason obtains for granting a Writ of Certiorari.

The purport of the decision of the Supreme Court of Indiana is that Respondent having been engaged in inter-

state commerce, she could not constitutionally be taxed thereon in pursuance of the provisions of the Indiana Gross Income Tax Act, as amended.

If we consider Petitioner's stated reasons for granting a Writ of Certiorari in the light of the opinion of the Supreme Court of Indiana, it follows that no sound reason prevails for granting such writ.

1. What question is presented not heretofore decided by this Court?

2. What question has been decided in a way not in accord with the applicable decisions of this Court? What decisions of this Court are contravened?

3. How is the decision untenable?—To whom or to what is the decision untenable?

4. What question of Federal Law should be settled in this Court? Has it not already been settled by the **Adams** case and the **Freeman** case?

Petitioner engages in a false premise that the lack of a prior order removes the transactions from the field of interstate commerce. From such false premise, Petitioner indulges the conclusion that because there was no prior order the transactions are taxable in pursuance of the provisions of the Indiana Gross Income Tax Act, as amended.

As we have pointed out above, supported by decisions of this Court whether there were or were not a prior order does not in any manner affect the situation; and, furthermore, the tax in question may not be applied to interstate commerce.

B.

The tax is not apportioned.

The mere fact that expenses of shipment and sale were deducted does not amount to an apportionment of the tax to local or intrastate activities. In **Freeman v. Hewitt** (1946), 329 U. S. 249, 91 L. ed. 265, this Court denied the validity of the present Gross Income Tax as applied to the receipts from the sale of intangibles after deducting costs and expenses. No convincing argument can be made that the application of the tax is on net income. And, even so, the State of Indiana must admit that the Indiana Gross Income Tax Act, as its name implies, is on gross receipts, not net receipts from commerce.

As stated in the opinion of this Court in the **Freeman** case:

“What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.”

C.

Respondent was not engaged in purely local activities.

The purport of Petitioner's argument appears to be that the transactions in the case at bar are taxable under the Act because they were wholly extra-state whereas in the **Adams** case the transactions were not taxable because they were partly extra-state and partly intra-state. We are unable to follow such reasoning, particularly in view of the pronouncements of this Court in the cases herein cited and which involve the same Tax Act.

If Petitioner's reason were extended, it could argue that, in violation of the Act and the Regulations, the business,

transactions and commerce of a resident or citizen of Indiana could be taxed wherever the same may take place.

Petitioner has been driven, without avail, to extreme ends in an attempt to present a logical argument. Despite the fact that this Court held that **American Mfg. Co. v. St. Louis** (1919), 250 U. S. 459, 63 L. ed. 1084, dealt with a municipal license fee or occupational tax and not a tax on gross sales as in the case at bar, Petitioner insists that this case falls within the other case.

Respondent does not dispute the proposition that Indiana might levy a non-discriminatory tax on the farmers of the State for the privilege of doing business within the State. This does not imply, however, that Indiana may tax gross receipts in interstate commerce in violation of the Constitution of the United States and contrary to the stated position of this Court.

International Harvester Co. v. Department of Treasury (1944), 322 U. S. 340, 38 L. ed. 1313, did not involve the same question. In that case, the tax was upheld by this Court because it was a tax on the "transfer of property" within Indiana.

Freeman v. Hewitt (1946), 329 U. S. 249, 91 L. ed. 265.

The instant case is distinguished from **Department of Treasury v. Ingram-Richardson Mfg. Co.** (1941), 313 U. S. 252, 85 L. ed. 1313, where the tax was permissible on receipts for services rendered by taxpayer within the State of Indiana.

In the case of **Gwin, White & Prince v. Henneford** (1939), 305 U. S. 434, 83 L. ed. 272, the validity of the tax was denied by this Court because the entire service for which compensation was paid was "in aid of the

shipment and sale of merchandise in that commerce' (interstate and foreign) and hence the service was held to be within the protection of the commerce clause."

Department of Treasury v. Ingram-Richardson Mfg. Co. (1941), 313 U. S. 252, 85 L. ed. 1313.

In the case of **Department of Treasury v. Wood Preserving Corp.** (1941), 313 U. S. 62, 85 L. ed. 1188, also cited by Petitioner, the tax was upheld on a foreign corporation qualified to do business in Indiana based upon receipts "derived from sources within the State."

The case of **Department of Treasury v. Allied Mills** (1942), 220 Ind. 340, aff'd 1943, 318 U. S. 740, 87 L. ed. 1120, cited by Petitioner, is unlike the case at bar.

CONCLUSION.

Petitioner has not shown a single reason why its Petition should be granted. Three erroneous premises stated in Conclusions in its brief fall by their very weight and we respectfully suggest that no good purpose would be served by granting the Petition. The opinion of the Supreme Court of Indiana is both accurate and logical, based upon precedents already announced by this Court. This same Indiana Gross Income Tax Act has been declared to be inoperative and unlawfully applied to transactions in interstate commerce. Thus, we respectfully request that the Petition be denied.

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